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In the Supreme Court of the United States

OCTOBER TERM, 1982

WAYNE PARSONS d/b/a EXECUTIVE MOTORS UNLIMITED,
PAYLESS CAR RENTAL SYSTEMS,
SOUTHWEST CAR RENTALS, EXECUTIVE LEASING,
WAYNE MOTOR SALES BJP ENTERPRISES and
W BAR J, INC.,

v.

FORD MOTOR COMPANY,
A. C. COLLINS FORD, INC.,
CHARLIE HILLARD FORD, INC.
HORN WILLIAMS FORD, INC. and
AL PIEMONTE FORD, INC.,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Section 1 of the Sherman Anti-Trust Act 15 U.S.C.(1) prohibits any contract, combination and conspiracy in restraint of trade. Certain types of combinations and conspiracies have been held to be "per se" restraints of trade and thus violative of Section 1 of the Sherman Act.

The essential question presented in this case is whether the vertical restraints of trade as practiced by the Defendant-Appellees, constitute a "per se" violation of Section 1 of the Sherman Act 15 U.S.C.(1).

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STATUTES:

15 U.S.C. § 1 (1973 & Supp. 1981)

In the Supreme Court of the United States

OCTOBER TERM, 1982

NO.

WAYNE PARSONS d/b/a EXECUTIVE MOTORS UNLIMITED,
PAYLESS CAR RENTAL SYSTEMS,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Wayne Parsons, d/b/a Executive Motors Unlimited, Payless Car Rental Systems, Southwest Car rentals, Executive Leasing, Wayne Motor Sales, BJP Enterprises and

W. Bar J, Inc., petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the district court of October 31, 1980, (Appendix A, infra pp. 1a) is not reported. The opinion of the court of appeals (Appendix B infra) is reported at 669 F.2d 308 (5th Cir. 1982).

JURISDICTION

The judgment of the court of appeals was entered on March 5, 1982 (Appendix B, infra, pp. 3a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Section 1 of the Sherman Anti-Trust Act 15 U.S.C.(1) prohibits any contract, combination and conspiracy in restraint of trade. Certain types of combinations and conspiracies have been held to be "per se" restraints of trade and thus violative of Section 1 of the Sherman Act.

The essential question presented in this case is whether the vertical restraints of trade as practiced by the Defendant-Appellees, constitute a "per se" violation of Section 1 of the Sherman Act 15 U.S.C(1).

STATUTES INVOLVED

The pertinent provision of the Sherman Act involved is Section 1 15 U.S.C.(1).

STATEMENT

Appellant Wayne Parsons is an independent automobile retailer and wholesaler who had been in the business of retailing and wholesaling both new and used automobiles as an independent dealer in Dallas County, Texas, for a number of years. Up until the latter part of 1976, Appellant's business consisted primarily of selling used automobiles to the public from several used car lots located in Dallas County, Texas, and wholesaling used cars and sometimes new cars, to both used and new car dealerships. During this period of time,Appellant utilized several names through which he conducted business, to wit: Executive Motors Unlimited, Southwest Car Rentals, Executive Leasing, Wayne Motor Sales, and BJP Enterprises. At times Appellant also engaged in the new car business through a Texas corporation, W-Bar-J, Inc.

Between early 1976 and the latter part of 1978, Appellant became involved in the business of purchasing and selling new Ford automobiles in a somewhat unique manner. During this period of time, Appellant individually, both in his name and in the names of various companies through which he conducted business, to wit: Executive Motors Unlimited, Payless Car Rental Systems, Southwest Car Rentals, Executive Leasing, Wayne Motor Sales, BJP Enterprises and W-Bar-J, Inc., purchased new Ford automobiles from various franchised Ford dealers throughout the United States and resold those new Ford automobiles to other franchised Ford dealers in the States of Texas, Oklahoma and elsewhere. Appellant would purchase such new Ford automobiles from authorized franchised dealers at a negotiated price above factory

invoice price for such automobiles and sell them to other franchised Ford dealers at a higher price negotiated with such Ford dealers who had agreed to purchase them from the Plaintiff, thus making a profit on the spread between the two prices. In addition to the basic price which the purchasing dealers would agree to pay Appellant for such automobiles, Appellant on occasions would charge certain expenses associated with the purchase and sale of such automobiles to the purchasing dealer, such as charges incurred in delivering the automobiles to the purchasing dealer. The "price" Appellant could purchase a vehicle from a selling dealer for and "price" at which he could sell it to another dealer for was a function of supply and demand in the market place and negotiation between the parties. The nature of the orders for new Ford automobiles which the Appellant would receive from the purchasing dealer would be both oral and written. The written orders would take the form of either standard retail purchase orders issued by the purchasing dealer or on occasions would take the form of Ford Motor Company order forms utilized by franchised Ford dealers to order new Ford automobiles from the Ford Factory.

On many occasions, the franchised Ford dealers from whom Appellant would purchase the cars, would sell the cars to the Appellant out of their "Basic Allocation" or on occasions would sell the vehicles to Plaintiff from a "Fleet Allocation".

In connection with Appellant's business of purchasing and selling new Ford automobiles between authorized franchised dealerships of the Ford Motor Company, Appellant on occasion entered into the rental car business, and for such purpose, purchased and operated a rental car

franchise known as Payless Car Rental Systems. The operation of Payless Car Rental Systems was not only a legitimate business enterprise, but also was of assistance to the Appellant in purchasing new Ford automobiles from authorized franchised dealers from Fleet Allocations.

The various names through which Appellant did business was a direct result of suggestions from selling franchised dealers who sold new Ford automobiles to Appellant with respect to facilitating such dealers obtaining an automobile for and on behalf of Appellant. In practically all instances, the selling dealer was aware of the fact that Appellant intended to resell the automobiles to another franchised Ford Motor Company dealer in another part of the state or country. In fact, the deposition testimony reveals that there was a substantial business within the Ford Motor Company system involving interdealer transfers of new Ford automobiles by and between dealers. Many times, these automobiles were transferred by one to another dealer with a significant markup involved between the dealers.

Appellant contends that in the summer and fall of 1977, the Ford Motor Company began a series or entered into a series of steps and agreed and conspired with various of its authorized Ford dealerships to freeze Appellant out of the market involving the transfer of new Ford automobiles from one dealer to another dealer, all to his damage, with a consequent anti-competitive affect on the new automobile market. It is Appellant's further contention that Ford Motor Company conspired with each of the named dealer Appellees, as well as others, to deprive him of the opportunity to purchase new Ford automobiles, and as a direct and proximate result of this anti-competitive conduct, Appellant was injured. Appellant

seeks to recover the profits he lost as a result of the actions of Ford Motor Company, and various of its authorized franchise dealerships which he alleges to be in violation of Section 1 of the Sherman Anti-Trust Act 15 USC (1).

On the 31st day of October, 1980, the United States District Court for the Northern District of Texas granted Defendants' Motions for Summary Judgment, Plaintiffs appealed. The Court of Appeals affirmed the judgment of the trial court.

REASONS FOR GRANTING THE WRIT

1. The decision below is in direct conflict with *United States* v. *General Motors Corporation*, 384 U.S. 127; 86 S.CT. 1321 (1966); and *Ford Motor Company* v. *Webster Auto Sales*, a decision out of the First Circuit Court of Appeals in 1960 reported in 361 F.2nd 874. The case is further in direct conflict with *United States* v. *Topco Associates, Inc.* 405 U.S. 596; 31L.Ed. 2nd 515; 92 S.Ct.1126 (1972) and *Bowen* v. *New York News, Inc.*, a decision of the Second Court of Appeals in 1975 found at 522 F.2nd 1242. In all of these cases, unilateral refusals to deal and "customer restrictions" imposed in a vertical fashion were held to be per se violations of Section 1 of the Sherman Act, 15 U.S.C. (1).

It is respectfully submitted that the "vertical restrictions" imposed by Ford Motor Company and the other Defendant in this case were in all things similar to the vertical "customer restrictions" imposed by the Defendants in the cases above cited.

2. Under Section 1 of the Sherman Act, a court finding a contract combination and conspiracy must then find that such contract, combination and conspiracy is in "restraint of trade." Certain types of combinations and conspiracies have been held to be "per se" restraints of trade and thus violative of Section 1 of the Sherman Act. A per se violation of the Sherman Act is defined in the case of *Northern Pacific RR. Co.* v. *United States*, 356 US 1, 5; 78 S.Ct.514, 518; 2 L.Ed.2d 545 (1958), wherein the Court said:

> "There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without an elaborate inquiry as to precise harm they have caused or the business excuse for their use. This principle of per se unreasonableness not only makes the type of restraint which are prescribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable."

The activities described in this litigation take the form of a concerted refusal to deal, the purpose of which was to (i) maintain a Ford Motor Company imposed allocation system for their products, and (ii) to hold down the ultimate sale price of their product to the ultimate consumer or resale price maintenance. (See deposition of Gary Lee Sears, pp. 26, 27, 29, 30). Concerted refusals to deal are a type of activity that has long been recognized by the courts as a restraint of trade and prohibited by the actions of Section 1 of the Sherman Act. *Klor's, Inc.* v.

Broadway-Hills Stores, Inc.,, 359 US 207; 79 S.Ct. 705 (1959). In fact, boycotts or concerted refusals to deal, (with respect to the Appellant therein, the probative evidence shows that the type of activity undertaken by the Appellee Ford Motor Company in concert with its respective dealers constitutes a refusal to deal and as such it is activity that is proscribed by the Sherman Act) has been so frowned upon that in the past it has been held to be a "per se" restraint of trade under the Sherman Act.

Activities which have been so classified are "price fixing" (vertical and horizontal), *United States* v. *Arnold Schwinn Co.*, 388 US 365; market allocations and division of markets, boycots and refusals to deal and resale price maintenance. *Albrecht* v. *Herald Co.*, 390 US 145; 88 S.Ct. 869; 19 L.Ed.2d 998 (1968); *Certnuto, Inc.* v. *United Cabinet Corp.*, 595 F2d 164 (3rd Cir., 1979); *United States* v. *Parke-Davis*, 362 US 29; 80 S.Ct. 503; 4 L.Ed.2d 505 (1960); *United States* v. *White Motor Co.*,, 372 US 253; 83 S.Ct. 696; 9 L.Ed.2d 733 (1963).

Sellers do not have an anti-trust carte blanche to select those with w. .m they will deal. On the contrary, a refusal to deal becomes unlawful when it produces an unreasonable restraint on trade, i.e. if there is an anti-competitive purpose or effect in selecting those with whom one will deal. A refusal to deal may not be used as a device to achieve some anticompetitive goal such as to acquire a monopoly, or to affect prices, or to establish market dominance and drive out existing competitors, or to aid the enforcement of unlawful resale price restrictions and territorial allocations. *(Alladdin Oil Co., supra.)*

It is respectfully submitted that the activities of Appellee Ford Motor Company in concert with its dealers herein in refusing to deal with Appellant, certainly border

upon a concerted refusal to deal which are to such an extent that they should be and could be classified as "per se" violations of Section 1 of the Sherman Act. Not only are they "naked" restraints of trade, and bold faced attempts to limit a seller in the market places in his choice of customers, they are likewise undertaken with that type of anticompetitive intent and affect that has long been classified as a "per se" violation of the Act, arbitrary market allocation and artificial price maintenance in the resale market.

Two cases are instructive: *United States* v. *General Motors Corp.*, 384 US 127; 86 S.Ct. 1321 (1966) and *Ford Motor Co.* v. *Websters Auto Sales, Iinc., Supra.*

The *General Motors case* involves a situation where certain enterpreneurs in the Los Angeles, California area began to offer to sell new Chevrolet automobiles to the public at allegedly bargain prices through the operation of "discount house" and "referral services." The nature of the operation of these discount houses and referral services were such that they would buy new Chevrolet automobiles in response to customer demands from authorized franchised dealerships of General Motors Corp. and are selling those vehicles to the public allegedly at prices below what the public could purchase such vehicles from authorized Chevrolet franchised dealerships. In response to claims from other authorized Chevrolet franchised dealerships to the respective District Sales Offices of General Motors Corp., General Motors Corp. undertook a course of conduct in connection and in concert with other franchise dealerships in General Motors Corp. and associations of Chevrolet dealers to bring a halt to the sale of new Chevrolet automobiles to discount houses and referral services by authorized Chevrolet dealerships. The con-

spiracy and combination took the part of pressure being put upon Chevrolet dealers not to sell new Chevrolet automobiles to discounters or referral services, calls by District Sales Manager and other District personnel upon Chevrolet dealers including offending dealers, pressure put to bear upon offending Chevrolet dealers to buy back any Chevrolet automobiles they had sold to discount houses as well as other types of pressure.

The court said that such activity constituted a classic conspiracy in restraint of trade; joint collaberative action by dealers, the dealer associations and General Motors to eliminate a class of competitors by terminating business dealings between them and a minority of Chevrolet dealers of deprive franchise dealers of the freedom to deal through discounters if they so choose, i.e. "customer restrictions." The court held that such activity was a "per se" violation of Section 1 of the Sherman Act. The facts in the General Motors case seem remarkably similar to the case before the court here in that an automobile manufacturer has taken steps, and significant probative evidence indicates such, to insure that his authorized franchised dealers do not deal with a particular specified party, to wit: the Appellant herein. Likewise, the activities of Appellee Ford Motor Company here seem remarkably similar to the prescribed activities of Ford Motor Company in the case of *Ford Motor Company* v. *Webster Auto Sales, supra.* In the *Webster* case, a used car dealer had made an arrangement with an authorized franchised dealer of the Ford Motor Company in the Boston, Massachusetts area for such authorized franchise deler to periodically bid on and obtain "company cars" (automobiles which had been drven by the company as either

demonstrators or by various officers of the Ford Motor Company that were customarily put up and periodically put up for sale). The authorized franchised dealer bid on such cars and obtained them for and on behalf of a used car dealer and subsequently sold them to him and the used car dealer subsequently retailed the cars to the general public. In response to a complaint from other dealers, steps were taken by the Ford Motor Company and the franchised dealer to insure that the used car dealer was unable to secure or continue to secure a supply of so-called "company cars" through such dealer. The court in so holding that such activity was a restraint of trade under the Sherman Act did not buy the argument of Ford Motor Company that it was simply exercising its perrogative to deal with whom it pleased under the Doctrine of the *Colgate Case, supra*, for the facts and evidence indicated that the Ford Motor Company had certainly taken steps to insure compliance with its wishes *beyond a mere announcement of a policy.* Both the *Ford* v. *Webster case* and the *General Motors case* put to rest any contention as is contended by the Appellees herein that a manufacturer through agreements with its dealers may seek to exclude a class of competitors from the market in the name of preserving a system of distribution.

Subsequent to the *General Motors* and *Ford* v. *Webster* cases, the Supreme Court and at least one Circuit court (2nd Cir.) in the *United States* v. *Topco Associates, Inc.*, 405 US 596; 31 L.Ed.2d 515; 92 S.Ct. 1126 (1972) and *Bowen* v. *New York News, Inc.*, 522 F2d 1242 (2nd Cir. 1975) have struck down "customer restrictions" imposes in a vertical fasion.

United States v. *Topco, supra*, was a case where an association of retail grocery chains organized for the purpose of marketing its own private label brand of grocery products imposed not only territorial restrictions on its members, but restricted its members from wholesaling to other grocery outlets. Justice Marshall in citing *General Motors, supra*, struck down Topcos restrictions on the right of its members to wholesale goods, i.e. "customer restrictions" and stated:

> The arena in which Topco members compete must be left to their unfettered choice absent a contrary congressional determination."

In further support, Ford's purported "fleet allocation" is an unlawful customer restriction designed by Ford to preserve its market allocation.

"*Fleet allocation*" is described as a system whereby a geographic area encompassing numberous dealers (known as a Ford District) obtains an allotment of vehicles out of which sales to fleet customers are filled. In order that Ford can preserve the integrity of their fleet allocations, they take action to "ensure that the vehicles so ordered are for a legitimate fleet customer for fleet use."

While any standardization of criteria on this customer restriction is conspiciously lacking it appears from the evidence that this determination is *ultimately left to Ford Motor Company rather than the individual retailer.*

The evidence clearly supports that is was Appellee Ford Motor Company who determined that Appellant was not a "legitimate fleet user" and subsequently harrassed the dealers into the illegal group boycott that prevented him from continuing his business in the manner that was, at all time prior, acceptable to all the immediate parties involved therein.

Even if the court determines that Ford's "fleet allocation" is a legitimate lawful purpose, which Apellant denies, it is clear that unlawful methods cannot be utilized to achieve an otherwise lawful purpose. *United States* v. *General Motors*, 384 US 127, 86 Ct. 132 (1966).

It is respectfully submitted that the facts as demonstrated by the record of these cases can reasonably lead to the conclusion that the activities undertaken by Appellee Ford Motor Company against the Appellant herein are of such a nature as to be classified as "per se" violations of the Sherman Act, as being proscribed customer restrictions, and illegal allocation of market and price maintenance, and thereby not necessitating any further inquiry as to their effect upon the public interest.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

WAYNE PARSONS,
Plaintiff

v.

FORD MOTOR COMPANY, et al,
Defendants

CIVIL ACTION
NO. CA-3-78-1548-D

JUDGMENT

Came on for consideration before the court, the Honorable Robert M. Hill, presiding, the motions for summary judgment filed by Ford Motor Company, A. C. Collins Ford, Inc., Charley Hilliard Ford, Inc., and Al Peimonte Ford, Inc., defendants, and the motion to dismiss filed by Horn-Williams Ford, Inc., defendant, and a decision having been duly rendered,

It is ORDERED AND ADJUDGED that:

(a) the plaintiff take nothing against the defendants Ford Motor Company, A. C. Collins Ford, Inc., Charley Hillard Ford, Inc., and Al Peimonte Ford, Inc., on plaintiff's federal antitrust action and that said action be dismissed on the merits;

(b) the plaintiff's pendant State law action against the defendants Ford Motor Company, A. C. Collins Ford, Inc., Charley Hilliard Ford Inc., and Al Peimonte Ford, Inc., be dismissed without prejudice;

(c) the plaintiff's action against the defendant Horn-Williams Ford, Inc., be dismissed; and

(d) the defendants Ford Motor Company, A. C. Collins Ford, Inc., Charley Hilliard Ford, Inc., Al Peimonte Ford, Inc., and Horn-Williams Ford, Inc., recover of the plaintiff Wayne Parsons their costs of action.

Dated this 31st day of October, 1980.

/s/ Robert M. Hill
ROBERT M. HILL
United States District Judge

APPENDIX B

Wayne PARSONS, d/b/a Executive Motors Unlimited, Payless Car Rental Systems, Southwest Car Rentals, Executive Leasing, Wayne Motor Sales, BJP Enterprises and W-Bar-J, Inc., Plaintiff-Appellant,

v.

FORD MOTOR COMPANY, A. C. Collins Ford, Inc. and Charlie Hillard Ford, Inc., et al., Defendants-Appellees.

No. 80-2258.
United States Court of Appeals, Fifth Circuit.
March 5, 1982.

Plaintiff, who was engaged in the interdealership transfer of new motor vehicles, brought antitrust suit against automobile manufacturer and a number of its individual dealers. The United States District Court for the Northern District of Texas, Robert Madden Hill, J., granted defendants' motion for summary judgment, and plaintiff appealed. The Court of Appeals, Garza, Circuit Judge, held that plaintiff could not recover under the federal antitrust laws from automobile manufacturer or its dealers as a result of manufacturer's formulation of a policy prohibiting dealers from selling to "bootleggers" who obtained vehicles from one dealer and resold them to another through manipulation of manufacturer's fleet allocation system, in absence of evidence of a conspiracy to prohibit vehicle sales to plaintiff.

Affirmed.

Monopolies 17(2.1)

Plaintiff, who was engaged in the interdealership transfer of new motor vehicles, could not recover under the federal antitrust laws from automobile manufacturer or its dealers as a result of manufacturer's formulation of a policy prohibiting dealers from selling to "bootleggers" who obtained vehicles from one dealer and resold them to another through manipulation of manufacturer's fleet allocation system, in absence of evidence of a conspiracy to prohibit vehicle sales to plaintiff. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

Appeal from the United States District Court for the Northern District of Texas.

Before GEE, GARZA and REAVLEY, Circuit Judges.

GARZA, Circuit Judge:

Wayne Parsons initiated this action against the Ford Motor Company and a number of individual Ford dealers[1], with the allegation that defendants had engaged in a conspiracy against him in violation of sections 1 and 2 of the Sherman Anti-Trust Act[2], as well as sections 15.02-.04

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[1] The individual Ford dealers included in the complaint were A. C. Collins Ford, Inc., Charlie Hillard Ford, Inc., Horn Williams Ford, Inc., and Al Piemonte Ford, Inc. The only dealers who are parties to this appeal are A. C. Collins Ford, Inc., and Charlie Hillard Ford, Inc.

[2] Section 1 of the Sherman Anti-Trust Act provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is de-

(*Footnote continued on following page.*)

of the Texas Business and Commerce Code. Specifically, plaintiff charged that he was frozen out of the market for new Ford vehicles after Ford formulated a policy prohibiting their dealers from selling to "bootleggers" like himself.

Plaintiff was engaged in the inter-dealership transfer of new Ford vehicles, commonly known as bootlegging, in the years 1976 through 1978. He conducted this venture under a variety of names; Executive Motors Unlimited, Payless Car Rental Systems, Southwest Car Rentals, Executive Leasing, Wayne Motor Sales, BJP Enterprises, and W. Bar J, Inc.

(*Footnote concluded from preceding page.*)

cared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.
15 U.S.C. § 1.

Section 2 provides:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation; or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.
15 U.S.C. § 2.

It is undisputed that, during these years, strong consumer demand existed for certain Ford models, such as pickups and Thunderbirds. In Texas, the state in which Parsons conducted the majority of his business, the demand for pickup trucks and vans was especially high. Many persons purchased them as recreational vehicles. Demand outstripped supply of these vehicles in many areas. Plaintiff alleviated this situation in the short run by inserting himself into the Ford allocation system. He purchased vehicles from one dealer and then resold them to another who was experiencing very high demand for the particular vehicle. Parsons contends that he simply increased interdealer competition by enabling dealers to obtain vehicles that they otherwise would have been unable to purchase.

Ford characterizes plaintiff's activities differently and charges him with obtaining vehicles from Ford dealers by fraudulently portraying himself as a ligitimate fleet purchaser of vehicles.[5] *He was only able to engage in this*

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[5] In response to questions from his attorney, Parsons explained the manner in which he purchased vehicles:

A. [H]e would want to know how to get a fleet allocation, so we would just give him the fleet number.

Q. You would say, "I am buying in a package."?

A. For Southwest Car Rental Systems. And—

Q. Its fleet number is such and such?

A. Fleet number, right. So we delivered; we got sixty cars the first day. I delivered them to Arendale.

Q. Now, did Dub Shaw then have to place an actual order for those fleet cars?

A. No, Dub Shaw had these units in stock. But what he did, once he showed these units or I'm saying, I am supposing this is how it was done, that when, I took sixty cars

(*Footnote continued on following page.*)

business because of the lower prices charged to fleet customers and the fact that dealers did not have to take fleet purchases off their show room floors. Ford maintains that once it ascertained the fraudulent nature of plaintiff's business, it took reasonable steps to ensure that vehicles ordered from district fleet allocations were actually purchased by legitimate fleet end-users.

(*Footnote concluded from preceding page.*)

out of his, what—his fleet, well then, he just called Ford fleet pool and says, "Look, I need a replacement."

Q. "I have sold sixty to Southwest."?

A. Sold sixty cars to Southwest or Hertz—he sold a lot to Hertz. He says, "I sold ninety-two to Hertz and I need ninety-two in stock." So when you start out in business, you start with the biggest people. When you start big, or people that are trying to become number one, you have a lot of ways to go about trying to get your cars.

Q. Well, were there occasions where you would call, just as an example, Dub Shaw and say, "I need sixty Broncos and"—

A. And he didn't have sixty?

Q. And he didn't have sixty?

A. Right. And then we would put in an order, start out putting in orders for the whole sixty. We found out that was an error with Ford, because it hits their computer. And when it hits their computer, it stops all the orders, so you don't order anything over twelve.

Q. That was a way that you could—

A. Keep ordering, yes.

Q. —keep ordering and not have Ford figure out who they were actually going to?

A. Right.

Q. All right. Were there occasions where you would call a Ford dealer like Dub Shaw and say, "I need so many units of such and such a car and they will be purchased through Southwest Car Rental's fleet number such and such." And

(*Footnote continued on following page.*)

The Ford allocation system at issue in this case is comprised of two components. In a given geographical area or "district," a dealer may obtain vehicles through both the "basic allocation" system and the "fleet allocation" system. A dealer's basic allocation is computed from the number of vehicle sales and the inventory of unsold vehicles. More sales and fewer models on the dealer's lot will result in an increased allocation; conversely, fewer sales and more unsold models decrease the allocation. The computations which provide the basis for this allocation are made on a monthly basis and separately for each Ford model.

The fleet allocation is calculated on a district, rather than dealer, basis. Generally, a fleet customer is one with ten or more vehicles, commonly for rental or corporate use. The separate fleet allocation system was established be-

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(*Footnote concluded from preceding page.*)

they would say, "I'm sorry, we can't use that name any more."?

A. That's right, yes, that's correct.

Q. All right. And then you would use some other name?

A. Yes, sir.

Q. All right. Now, and some other fleet number?

A. If we had a fleet number. That was the reason for the purchase, actually, a Payless, to obtain a Ford fleet number and a GM fleet number.

Q. Through the Payless Car Rental Systems, did you have a fleet number with Ford?

A. Yes, sir.

Q. Was that their national fleet?

A. That was their national fleet, yes sir.

Q. The same as—

A. Yes, sir.

Q. So did you use this national fleet number then to purchase cars that you wholesaled?

A. Yes, sir.

Deposition of Thomas Wayne Parsons, vol. 1, at 74-76.

cause, while it is relatively easy to determine the number of large fleet customers in a district, it is very difficult to predict from which dealer a large fleet purchaser will seek to fill his requirements. Without the availability of a separate fleet allocation, a dealer might be unable to fill a major order by a large fleet user or could be left temporarily without vehicles to sell to other customers. Fleet customers are obviously very important to Ford sales; it is, therefore, critical that an adequate stock of vehicles be maintained for this purpose.

Ford's allocation system does not always work perfectly; obviously, it is difficult to prognosticate trends in vehicle sales. Plaintiff asserts that the failure of the allocation system led him into this "bootlegging" business. A Ford dealer offered to purchase vehicles bought from other dealers. Parsons also credits dealer suggestions with leading him to do business under many different names. Allegedly, this venture was very successful until Ford conspired with its dealers to force him out of business.

Ford paints a very different picture of plaintiff's operation. The company categorically denies any policy to prohibit sales to Parsons. Plaintiff was only required to demonstrate that he was a legitimate fleet buyer in order to take advantage of the fleet allocation system and price. Any fraudulent fleet purchase could have been filled from a dealer's basic allocation. This policy did adversely affect plaintiff, since he was not a legitimate fleet purchaser.[4]

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[4] Parsons admitted that he was not a legitimate fleet buyer in his deposition testimony:

> Q. But you purchased as a fleet purchaser, or attempted to, so that . . . dealer would replace that car that he sold to you from fleet stock; isn't that true?

(*Footnote continued on following page.*)

However, Ford contends that it was well within its rights to implement such a policy.[4]

(Footnote concluded from preceding page.)

A. Yes. Now, on small numbers, even as Executive Motors, Wayne Motor Sales, I bought hundreds of cars that way. They can replace, if—until they get to seeing big numbers, then all of a sudden they will reject their replacement order.

Q. They being who?

A. Ford Motor Company or any manufacturer, I suppose.

Q. That is, if you are not a qualified fleet buyer?

A. Yes.

Q. And you weren't, were you?

A. No.

Deposition of Thomas Wayne Parsons, vol. 1, at 421-22.

[4] In an effort to demonstrate the reasonableness of its action, Ford sets out a detailed rationale for its admitted dislike of bootleggers like Parsons, who harm Ford, its dealers and customers. When a new vehicle is sold, the dealer submits a Retail Delivery Card (RDC) to Ford. The warranty period for the vehicle begins when this RDC is received by Ford. This takes place even though, in the case of bootlegged vehicles, the ultimate purchase by a consumer may not occur for several months. When the consumer does purchase the vehicle, he will be left with a nine or ten month warranty, instead of the twelve month warranty expected. The problems with these "stale" or "dirty" warranties did present great problems for consumers as well as the manufacturer and dealers. The magnitude of this problem led the Office of the Attorney General of Texas to conduct an investigation. Subsequently, a staff opinion was issued which indicated that the undisclosed sale of cars with stale warranties constituted a deceptive trade practice.

Record, vol. 2, at 377-79.

The RDC permits Ford to contact the owner of a vehicle in the event a recall is necessary. When a bootlegger purchases a

(Footnote continued on following page.)

After plaintiff filed his original complaint, defendants moved for dismissal of all claims. The trial court granted this motion as to the section two Sherman Act claim. That claim, which was directed solely against Ford Motor Company, charged defendant with attempting to monopolize the sale of new Fords. The court pointed out that every manufacturer has a natural monopoly in the sale of his own products; such natural monopolies do not contravene anti-trust laws. *United States* v. *E. I. de Pont de Nemours & Co.*, 351 U.S. 377, 393, 76 S.Ct. 994, 1006, 100 L.Ed. 1264 (1956); *Spectrofuge Corp.* v. *Beckman Instruments, Inc.*, 575 F.2d 256 (5th Cir. 1978); *cert. denied*, 440 U.S. 939, 99 S.Ct. 1289; 59 L.Ed.2d 499 (1979). Upon completion of discovery, defendants moved for summary judgment on the remaining claims. At that time, the court granted summary judgment on the Sherman Act claim and dismissed plaintiff's state law claims without prejudice. The plaintiff brings this appeal to challenge the court's grant of summary judgment. After examining the record, we conclude that this was a proper case for summary disposition and, therefore, we affirm the decision of the trial court.

(*Footnote concluded from preceding page.*)

vehicle and then resells to another dealer, this is impossible. Additionally, when a dealer receives a car directly from Ford, the corporation is responsible for pre-delivery damage. Bootlegged vehicles can incur wear and tear without the ultimate dealer's knowledge. Many times, they are driven with disconnected odometers.

Finally, bootlegging disrupts the allocation system by creating an apparent demand in the location where the purchase is made when in fact the demand is in the location where the bootlegger resells the vehicle.

Before beginning a discussion of this case, we pause to acknowledge that summary judgment is extreme relief which should be approached very cautiously. The Supreme Court has long recognized that this procedure should be considered especially carefully in anti-trust actions. *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962). This is certainly not to say, however, that the procedure is inapplicable to anti-trust cases. *See Solomon* v. *Houston Corrugated Box Co.*, 526 F.2d 389 (5th Cir. 1976); *Blackburn* v. *Crum & Forster*, 611 F.2d 102 (5th Cir.), *cert. denied*, 447 U.S. 906, 100 S.Ct. 2989, 64 L.Ed.2d 856 (1980). The appropriateness of summary judgment depends on the facts of the case considered.

Rule 56 of the Federal Rules of Civil Procedure mandates that prior to a grant of summary judgment a trial court must determine that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. The evidence must be viewed in a light most favorable to the opposing party. Our review of the district court's judgment proceeds upon the same standard.

Parsons charged Ford Motor Company and certain named dealers with conspiring to force him out of the business in which he was theretofore engaged. This allegation was answered by defendants in the form of sworn denials. This Court recognizes that once defendants have made such sworn denials, summary judgment is appropriate unless plaintiff can produce significant probative evidence demonstrating the existence of a genuine fact issue. *Solomon* v. *Houston Corrugated Box Co.*, *supra*, at 396. The trial judge found that plaintiff had failed in this task, despite the extensive discovery permitted.

Indeed, the plaintiff offered very meager evidence of conspiracy.[6] Moreover, when this evidence is closely examined, we find that the allegations merely reiterate that which Ford has admitted. Neither Ford nor many of its dealers like bootlegging, and they therefore took proper steps to ensure against future manipulation of the fleet allocation system. Enforcement of the company's fleet allocation system policy is not equivalent to conspiracy.[7]

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[6] The basis of his conspiracy charge against Charlie Hillard Ford was his testimony that the fleet sales manager, Charles Faulkner, told him that "he couldn't sell me any more cars because Ford Motor Company was jumping up and down, but they was [sic] going to put a stop to their cars being redistributed." Deposition of Thomas Wayne Parsons, vol. 1, at 231-32. However, Faulkner testified that he never told Parsons that no more sales could be made. He simply told him that he would be required to meet the qualifications required of all legitimate fleet purchasers.

Plaintiff's evidence of a conspiracy between Ford and A. C. Collins Ford is similarly unsubstantial. In response to charges of conspiracy, both A. C. Collins and his fleet manager, Leonard Hodges, testified that they became aware of Ford's concern about bootlegging and simply instituted a policy to ensure the legitimacy of fleet purchases. A. C. Collins required plaintiff to register each purchased vehicle unless he certified that the vehicle was going to an out-of-state fleet.

[7] Plaintiff did not wage an effective direct attack on Ford's fleet allocation system. He did attack the manner in which the system was directed by Ford. He contended that Ford, without standardized criteria, determined his purchases were not legitimate and subsequently harassed their delaers into refusing to deal with him. However, such a policy was repeatedly denied by all others involved. The fleet allocation system was clearly designed to facilitate sales to legitimate fleet end-users. Plaintiff admittedly did not fit in that category.

(*Footnote continued on following page.*)

Given the dearth of conspiracy evidence, the plaintiff was properly prohibited from proceeding to trial on the hope of developing evidence to support allegations made in the complaint. *First National Bank* v. *Cities Service Co.*, 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968).

Plaintiff's failure to present significant probative evidence of conspiracy in response to defendants' sworn denials of all allegations rendered this case proper for summary disposition.[8] The district court granted a sum-

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(*Footnote concluded from preceding page.*)

In order to prevail in an attack on the allocation system, plaintiff would be required to demonstrate that the system was unreasonable in view of "the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable." *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238, 38 S.Ct. 242, 244, 62 L.Ed. 683 (1918). *See National Auto Brokers* v. *General Motors Corp.*, 572 F.2d 953, 960 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072, 99 S.Ct. 844, 59 L.Ed.2d 38 (1979). Parsons merely characterized the system as an impermissible "customer restriction."

[8] In the face of failure to produce evidence of a conspiracy to prohibit vehicle sales to him, plaintiff attempts to characterize Ford's actions as price-fixing. Ford did admit that its dislike of bottlegging was based, in part, on the fact that the practice decreases the competitiveness of its vehicles because of the added cost of the bootlegger's profit. This admission falls far short of price-fixing. In *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940), the Supreme Court defined price-fixing as follows:

> Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se . . . Price-fixing agreements may have utility to members of the group

(*Footnote continued on following page.*)

mary judgment for the defendants; we leave that decision undisturbed.

AFFIRMED.

(*Footnote concluded from preceding page.*)

though the power possessed or exerted falls far short of combination and control. Monopoly power (*United States* v. *Patten*, 226 U.S. 525, 33 S.Ct. 141, 57 L.Ed. 333, 44 LRA(NS)325) is not the only power which the Act strikes down, as we have said. Proof that a combination was formed for the purpose of fixing prices and that it caused them to be fixed or contributed to that result is proof of the completion of a price-fixing conspiracy under Section 1 of the Act.

Id. at 223-24, 60 S.Ct. at 844.

The record is barren of any evidence that Ford even attempted to control the price of its vehicles. This contention is completely meritless.

Supreme Court, U.S.
FILED
JUL 8 1982
ALEXANDER L. STEVAS,
CLERK

81-2238
No. _____

IN THE
Supreme Court of the United States
October Term 1982

WAYNE PARSONS d/b/a EXECUTIVE MOTORS UNLIMITED,
PAYLESS CAR RENTAL SYSTEMS,
SOUTHWEST CAR RENTALS, EXECUTIVE LEASING,
WAYNE MOTOR SALES BJP ENTERPRISES and
W BAR J, INC.,
Petitioner,
v.
FORD MOTOR COMPANY,
A.C. COLLINS FORD, INC., and
CHARLIE HILLARD FORD, INC.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Did the court below properly affirm summary judgment dismissing Petitioner's allegation that Respondent manufacturer, Ford Motor Company, imposed illegal vertical restraints on certain of its dealers where, after completion of all discovery, Petitioner failed to present significant probative evidence of any genuine issue of fact regarding the existence of any alleged restraint?

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No. _____

IN THE

Supreme Court of the United States

October Term 1982

WAYNE PARSONS d/b/a EXECUTIVE MOTORS UNLIMITED, PAYLESS CAR RENTAL SYSTEMS, SOUTHWEST CAR RENTALS, EXECUTIVE LEASING, WAYNE MOTOR SALES BJP ENTERPRISES and W BAR J, INC.,

Petitioner,

v.

FORD MOTOR COMPANY, A.C. COLLINS FORD, INC., and CHARLIE HILLARD FORD, INC.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

Respondents adopt the statement of the opinions below submitted by Petitioner. The district court opinion, which was not included in the Appendix to the Petition, is attached as an Appendix to this Brief.

JURISDICTION

Respondents adopt the statement of jurisdiction submitted by Petitioner.

STATEMENT OF THE CASE

A. PROCEDURAL BACKGROUND

Petitioner filed this case against Respondent Ford Motor Company ("Ford") and various of its dealers on December 28, 1978. On October 31, 1980, after completion of all discovery, the United States District Court for the Northern District of Texas granted Respondents' Motions for Summary Judgment, dismissing Petitioner's allegation that Ford restrained certain of its dealers, including Charlie Hillard Ford, Inc. ("Hillard") and A. C. Collins Ford, Inc. ("Collins") from selling vehicles to Petitioner in violation of Section 1 of the Sherman Act (15 U.S.C. § 1). The district court based its holding on at least two grounds, the principal one being that:

> "Once sworn denials of the alleged conspiracy have been made, the plaintiff in an antitrust suit must produce *significant probative evidence* demonstrating the existence of a genuine fact issue in order to avoid summary judgment [citation omitted]. The plaintiff here has failed to produce such evidence, despite the extensive discovery that [has] taken place in this cause." (Appendix A) [Emphasis in original.]

On March 5, 1982, the United States Court of Appeals for the Fifth Circuit affirmed the district court's ruling,

concluding that:

> "Plaintiff's failure to present significant probative evidence of conspiracy in response to defendants' sworn denials of all allegations rendered this case proper for summary disposition." (Pet. 14a)[1]

On April 5, 1982, the court of appeals denied Petitioner's Motion for Rehearing.

B. STATEMENT OF FACTS

1. The Nature of Respondents' Business

Respondents are Ford and two Ford dealers, who purchase vehicles from Ford which they sell at retail. During the years 1976 through 1978, consumer demand for certain Ford vehicles became so great that Ford's production capacity could not meet it (R. 381). Ford's production of these scarce vehicles was allocated to its dealers by a system which consisted essentially of two parts; a "basic allocation" of vehicles to each dealer based primarily on the dealer's historically reported sales and its inventory of unsold vehicles, and a "fleet allocation" to each Ford district (R. 382). This system is described in greater detail in the opinion of the court of appeals (Pet. 8a-9a).

Ford's dealers were free to sell vehicles to customers of their choice (R. 382). Normally, the dealer purchased vehicles from the basic allocation. Vehicles sold for fleet use, however, could be obtained from the district fleet

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[1] References marked "Pet." are to the Petition for a Writ of Certiorari filed in this Court. References marked "R." are to the official record on appeal below as prepared by the Clerk of the United States District Court for the Northern District of Texas.

allocation.[2] This provided each dealer, regardless of its normal retail volume or basic allocation, an equal opportunity to supply a fleet's requirements without diminishing the dealer's ability to supply other customers (R. 382).

2. The Nature of Petitioner's Business

In the trial court, Petitioner claimed that during the period of high consumer demand in 1976 through 1978, he engaged in a practice known in the automotive industry as "bootlegging" (R. 135-36). This practice consisted of buying a new vehicle from one Ford dealer and selling it at a profit to a second dealer, which would sell it to the public (R. 135-36). As Petitioner testified in his deposition, the success of this operation depended on his ability to obtain the vehicles from Ford's fleet allocation, despite the fact that he was not a legitimate fleet purchaser (W. Parsons depos. pp. 418, 421-22). Petitioner typically purchased vehicles under fictitious (or occasionally real) fleet names (R. 132) or under phony circumstances so that the transactions were falsely reported to Ford as fleet sales by the first dealer.[3] This method of operation enabled the dealer to obtain extra vehicles from the fleet allocation which it was willing to sell to Petitioner on more favorable terms than if it had to supply the vehicles from its own basic allocation. (Tucker depos. pp. 30-31, 50-51.)

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[2] Fleets are generally defined as operators of ten or more vehicles which are purchased for their own fleet use, with some latitude for new fleets or temporary fluctuations in fleet size. In all cases vehicles from the fleet allocation were to be registered and put into service by the fleet (R. 382).

[3] Petitioner's method of operation is set forth in greater detail in the exerpts from his testimony quoted in footnote 3 and 4 of the Court of Appeals' opinion (Pet. 6a-10a, nn. 3,4).

Because such sales to bootleggers were reported to Ford as fleet sales by the first dealer rather than retail sales by the second dealer, the transactions distorted the sales history upon which Ford's allocation system was based, made recalls difficult or impossible, and resulted in the ultimate owner receiving a partially expired warranty. Bootlegging also had several other detrimental effects on the consumer, including the increased costs added by the extra dealer's profit and the costs added by the bootlegger (See Pet. 10a-11a, n. 5; 14a-15a, n. 8).

3. Ford's Operation of Its Allocation System

Although Ford did not restrict its dealers with respect to the customers to whom they sold, it monitored the placing of orders from its fleet allocation to assure that vehicles ordered were for legitimate fleet use. If a dealer submitted an order which Ford determined not to be for legitimate fleet use, Ford gave the dealer the opportunity to have the order filled from its basic allocation (Sears depos. p. 38, Pet. 13a, n. 6).

Other than his own speculation, Petitioner submitted no evidence that Ford took any measure to prevent dealers from selling to Petitioner. The dealership personnel who were deposed testified that they were free to sell to Petitioner, although Ford, and in some cases the dealerships themselves, took steps to assure that purchases for other than fleet use came from the dealer's basic allocation (Pet. 13a, n. 6). Basically, dealers would sell to Petitioner on the same basis as any other non-fleet user. Petitioner admitted that there were always dealers willing to sell vehicles to him (W. Parsons depos. p. 225). This admission was confirmed by two of Petitioner's own witnesses (Hackler depos. p. 116; Tucker depos. pp. 64-65).

ARGUMENT

A. THE COURTS BELOW PROPERLY CONCLUDED THAT PETITIONER FAILED TO SUBMIT SUBSTANTIAL PROBATIVE EVIDENCE OF THE CONSPIRACIES ALLEGED IN THE PETITION.

As set forth in Sup. Ct. R. 17.1 this Court will grant a Writ of Certiorari only when warranted by "special and important reasons." No reason of the sort envisioned by the rule is presented by the Petition before the Court in this case. Although the Petition suggests the existence of a conflict between the Fifth Circuit's decision below and decisions by this Court and other courts of appeal, the following argument and authorities make clear that no such conflict exists.

Petitioner's entire argument for granting a Writ of Certiorari in this case *assumes* the existence of vertical restraints imposed by Ford on the Respondent dealers (See Pet. 6-7). This assumption completely disregards the court's rulings below that Petitioner failed to provide sufficient probative evidence of such restraints to avoid summary judgment. These rulings, which Petitioner does not challenge or even address,[4] make it inappropriate to to press in this Court the question which Petitioner proposes: "Whether the vertical restraints of trade . . . constitute a 'per se' violation of Section 1 of the Sherman Act" (Pet. 2).

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[4] Although the Petition makes the bare assertion that "significant probative evidence indicates" that Ford took steps to prevent dealers from selling to Petitioner (Pet. 10), it gives no indication of what that evidence might be and disregards the contrary conclusions of the courts below.

The decisions of this Court and the various courts of appeals have consistently held, as did the Fifth Circuit in this case, that once defendants have submitted sworn denials to a plaintiff's allegations of conspiracy, "summary judgment is appropriate unless plaintiff can produce significant probative evidence demonstrating the existence of a genuine fact issue" (Pet. 12a). See *e.g.*, *First National Bank* v. *Cities Service Co.*, 391 U.S. 253, 88 S.Ct. 1575 (1968); *Weit* v. *Continental Illinois National Bank & Trust Co.*, 641 F.2d 457 (7th Cir. 1981), *cert. denied*, — S. Ct. — (1982); *Baum* v. *Gillman*, 648 F.2d 1292 (10th Cir. 1981); *Program Engineering, Inc.* v. *Triangle Publications, Inc.*, 634 F.2d 1188 (9th Cir. 1980); *Nifty Foods Corp.* v. *Great Atlantic & Pacific Tea Co.*, 614 F.2d 832 (2d Cir. 1980). This principle follows from a straightforward reading of Fed. R. Civ. P. 56(e), which provides in relevant part:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

The deposition testimony of the numerous Ford employees and dealer personnel, developed through extensive discovery, uniformly revealed that dealers were free to sell to Petitioner on the same basis as any other purchaser (*See* references in Pet. 130, note 6). Unless Petitioner met the criteria required of any other purchaser of vehicles from the fleet allocation, the vehicles sold to him were to come from the dealer's basic

allocation. *Id.* The lower courts properly held that summary judgment was warranted by Petitioner's failure to adduce significant probative evidence that Ford had restrained dealers from selling to him.[5]

B. EVEN IF PROVED, THE ALLEGED VERTICAL CONSPIRACIES WOULD NOT VIOLATE THE SHERMAN ACT.

Even if the decisions below had turned on the legality of the alleged vertical restraints rather than Petitioner's failure to adduce evidence of their existence, no appropriate issue would be presented for this Court's review. Petitioner asserts that Ford entered into vertical conspiracies with each of the Respondent dealers "to deprive him of the opportunity to purchase new Ford automobiles" and "to freeze [Petitioner] out of the market involving the transfer of new Ford automobiles from one dealer to another dealer" (Pet. 5). Petitioner inappropriately characterizes these alleged conspiracies as "refusals to deal" and vertical "customer restrictions" which Petitioner claims to be *per se* violations of the Sherman Act under various decisions of this and other Courts (Pet. 7,8).

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[5] As Respondents pointed out below, Petitioner fell short of establishing a Sherman Act violation in numerous other respects, including failure to show that the alleged series of vertical conspiracies unreasonably restrained trade, that they injured competition, or that they were motivated by anticompetitive intent. In view of the lower court's dispositive holding as to lack of significant probative evidence of the existance of alleged restraints, these points need not be addressed herein except to underscore Petitioner's pervasive failure to adduce significant probative evidence to sustain his Sherman Act claim.

It should be emphasized that throughout this action, Petitioner has alleged purely vertical customer restraints, and has made no allegations nor proof of any horizontal restraint or effect. Yet the Petition is devoid of any discussion of *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 97 S.Ct. 2549 (1977), under which the alleged conspiracies, even if proven, would clearly be the sort which this Court held to be judged by the "Rule of Reason."[6] See, *e.g.*, *The Sports Center, Inc.* v. *Riddell, Inc., Judge Little Company and Hale & Jones, Inc.*, 1982-1 Trade Cas. ¶ 64,688 (5th Cir. 1982); *Borger* v. *Yamaha Intl. Corp.*, 625 F.2d 390 (2d Cir. 1980); *Cowley* v. *Braden Indus.*, 613 F.2d 751 (9th Cir.), *cert. denied*, 100 S.Ct. 2942 (1980).

As pointed out in Ford's brief in the Fifth Circuit (pp. 26 and 27), the cases relied upon by Petitioner do not support the premise of Petitioner's argument, and are clearly distinguishable from this case. In *United States v. General Motors Corp.*, 384 U.S. 127, 86 S.Ct. 1321 (1966), several GM dealers attempted among themselves to preclude other dealers from selling to "discount houses" which competed directly with them. They eventually enlisted General Motors' help in doing so and this Court found the resulting horizontal restraint to be violative of the antitrust laws. The record makes clear that no such horizontal element is either alleged or proven in this case (W. Parsons depos. pp. 50, 244, 352). In *General Motors*, as well as *Bowen* v. *New York News, Inc.*, 522 F.2d 1242 (2d Cir. 1975) and *Ford Motor Co.* v. *Webster's Auto Sales, Inc.*, 361 F.2d 874 (1st Cir. 1966) (all pre-*Continental T.V.* cases), the manufacturer imposed restraints at the insistence of dealers seeking to

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[6] Given the numerous detrimental effects of bootlegging (see Pet. 10a-11a, n. 5), even had the alleged restraints existed, Respondents respectfully submit that they would have been lawful.

squeeze out sellers in direct competition with them in the retail market. Here, the only conspiracies alleged are restraints unilaterally imposed by Ford on individual dealers selling to Petitioner. Petitioner was not selling in competition with Ford dealers, but was merely selling vehicles from one Ford dealer to another (W. Parsons depos. p. 244).

Similarly, *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 92 S.Ct. 1126 (1972), involved horizontal restrictions among direct competitors, not vertical restrictions imposed by an independent supplier. In sum, Petitioner's argument that a purely vertical customer restraint is a *per se* violation of the Sherman Act is without merit. It runs contrary to this Court's ruling in *Continental T.V.*, has no support in the decisions of this Court or the courts of appeal since *Continental T.V.*, and is not even supported by the cases cited in the Petition.

In the closing pages of his argument, Petitioner suggests that the mere operation of Ford's fleet allocation may somehow violate the Sherman Act (Pet. 12-13). Petitioner's argument is necessarily imprecise because Petitioner's bootlegging business depended for its success on the fleet allocation's existence (and his ability to manipulate it through the use of falsified orders). Therefore, Petitioner seems to attach some significance to the fact that Ford determined eligibility for the allocation and took steps to see that ineligible orders were filled from the basic allocation instead (Pet. 12-13). As the court of appeals stated:

> "The fleet allocation system was clearly designed to facilitate sales to legitimate fleet end-users. [Petitioner] admittedly did not fit in that category" (Pet. 13a, n. 7).

Clearly, if Ford could legitimately establish the fleet allocation, Ford could determine eligibility for fleet allocation and take reasonable steps to prevent ineligible access to it. It would be counterproductive to have a separate fleet allocation if dealers could use it for whatever orders they chose.

Ford had legitimate, compelling business reasons to create the fleet allocation to enable dealers to supply the needs of fleet users and to see that the allocation was not abused. Courts which have considered a manufacturer's implementation of such allocation systems have not found them to violate the antitrust laws. See, *e.g.*, *National Auto Brokers Corp.* v. *General Motors Corp.*, 572 F.2d 953, 960 (2d Cir. 1978), *cert. denied*, 439 U.S. 1972 (1979); *Tripper Corp.* v. *Chrysler Corp.*, 484 F. Supp. 507, 511 (N.D. Cal. 1980), *aff'd. by unpub. mem. op.*, (9th Cir., August 26, 1981).

CONCLUSION

The Petition for a Writ of Certiorari filed in this case does not present an appropriate issue for granting such a Writ. After completion of discovery, and based upon well-established standards which Petitioner has not challenged, the courts below ruled that summary dismissal of Petitioner's claims of conspiracy was warranted under Fed. R. Civ. P. 56, based on Petitioner's lack of significant probative evidence. Review of that ruling by this Court is neither requested by the Petition nor appropriate. In view of the total lack of authority to support Petitioner's contention that purely vertical

customer restrictions should be held illegal *per se* under Section 1 of the Sherman Act, the question Petitioner proposes for review would not be appropriate even if the alleged conspiracies could be proved. The Petition should be denied.

Respectfully submitted,

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APPENDIX

ORDER

(In the United States District Court
for the Northern District of Texas
Dallas Division)

(Filed Oct. 31, 1980)

(WAYNE PARSONS, Plaintiff v. FORD MOTOR COMPANY, ET AL, Defendants, CIVIL ACTION NO. CA-3-78-1548-D)

Came on for consideration the defendants' Motions for Summary Judgment. The court has carefully considered the motions, the papers filed in connection with it, the oral arguments presented at the hearing on the motions and the extensive record in this case and is of the opinion that the motions should be granted.

Although the use of the summary judgment procedure should be approached with caution in antitrust case[s], *see e.g. Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464 (1962), it is appropriate to use this procedure in antitrust cases when the circumstances of the case merit summary disposition. *See Solomon v. Houston Corrugated Box Co.*, 526 F.2d 389 (5th Cir. 1976). The circumstances of this cause present such an opportunity.

One element of any case which alleges violations of section 1 of the Sherman Act is a showing that the defendants conspired or combined to act. The plaintiff in this cause has failed to meet this initial burden. Although the plaintiff has alleged that the defendants, through a series of vertical conspiracies between Ford and each of its dealers, conspired to put him out of business, these allegations alone will not suffice to raise a material question of fact in light of the sworn denials contained in the record. Once sworn denials of the

alleged conspiracy have been made, the plaintiff in an antitrust suit must produce *significant probative evidence* demonstrating the existence of a genuine fact issue in order to avoid summary judgment. *Solomon, supra*. The plaintiff here has failed to produce such evidence, despite the extensive discovery that that [*sic*] taken place in this cause. For this reason summary judgment is appropriate on plaintiff's federal antitrust action in this case.

In addition, however, summary judgment is appropriate for at least one other reason. Even if there was significant probative evidence of a series of vertical conspiracies as alleged by the plaintiff, there is *no* evidence of casuation [*sic*] which is also required for a prima facie case under the Sherman Act. Plaintiff admits that he could *always* get cars from some Ford dealers throughout the period in question. Therefore, any loss of sales suffered by the plaintiff was not due to an inability to get cars, but can, instead, be attributed to other factors such as the opinion letter from the Texas Attorney General's office which states that bootlegged cars were used, not new, cars.

The plaintiff in this case has also raised state law claims under the *Tex. Bus. & Comm. Code* §§ 15.02, 15.03, and 15.04. Since the summary disposition of the federal antitrust claim removes the jurisdictional basis for the plaintiff's pendent state claims, *see United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966), this court is of the opinion that these claims should also be dismissed without prejudice. *Daniels v. All Steel Equipment, Inc.*, 590 F.2d 111 (5th Cir. 1979).

It is so ORDERED.

Dated this 31 day of October, 1980.

By: /s/ Robert Hill
United States District Judge